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No. 87-

IN THE

UNITED STATES SUPREME COURT

October Term, 1987

GUS CURCIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Where a federal prisoner files a motion for new trial, invoking Fed.R.Crim.P. 33 and supported by sworn affidavits on personal knowledge, alleging a prosecutorial false statement to the trial and appellate courts which provided both the basis for a critical evidentiary ruling at trial and for that ruling's appellate affirmance, may the motion be dismissed without a hearing even though the "files and records of the case" do not "conclusively show" (as provided in 28 U.S.C. § 2255) that "the prisoner is entitled to no relief"?

2. Will later-discovered evidence that a federal prosecutor's statement about his ability and intention to call certain witnesses was knowingly or recklessly false support the award of a new trial, when the statement was relied upon by the trial court and the court of appeals in making and then upholding a critical and prejudicial evidentiary ruling?

3. Where cross-examination of defense witnesses is expected to produce at most an admission of having heard of incidents which, if they occurred, would be probative of intent or plan, may a federal prosecutor properly engage in such questioning in reliance on a mere good-faith belief that the incidents occurred, or must the prosecutor be in a position to prove the defendants' involvement in their occurrence through available and admissible evidence?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Gus Curcio and the United States). James G. Hawley was a co-defendant at trial.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GUS CURCIO respectfully petitions this Court for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Second Circuit entered on August 17, 1987, upholding the denial of his Motion for a New Trial on a conviction and sentence in the United States District Court for the District of Connecticut on a charge of attempted extortion under the Hobbs Act.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit, filed on August 17, 1987, is Appendix A. It is published at 826 F.2d 196 (per curiam). The unpublished Ruling of the District Court (Hon. Ellen Bree Burns, U.S.D.J.), dated and filed February 20, 1987, denying the Motion for New Trial, is Appendix B. The Second Circuit's prior Opinion, affirming the petitioner's conviction on direct appeal, is Appendix C; it is published at 759 F.2d 237 (1985) (Winter, J.).

JURISDICTION

The judgment and decision of the United States Court of Appeals for the Second Circuit affirming the denial of the petitioner's Motion for New Trial in a federal criminal case were entered on August 17, 1987. By Order dated October 15, 1987, Justice Marshall extended the time for filing this petition to and including November 15, 1987 (which, being a Sunday, makes the last day for filing November 16, 1987, pursuant to Rule 29.1). Appx. D (No. A-296). This petition is filed within that time. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1) (1982).

The jurisdiction of the court below rested upon 28 U.S.C. §1291 and was timely invoked by Notice of Appeal filed within ten days of the denial of the motion. The District Court's jurisdiction was properly invoked under 18 U.S.C. §3231 and either Fed.R.Crim.P. 33, as the motion was filed within two years of judgment, or 28 U.S.C. §2255 (1982).

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in part: "No person shall . . . be deprived of . . . liberty . . . without due process of law . . . ."

Federal Rule of Evidence 404(b) provides, in part: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other

purposes, such as proof of . . . intent, preparation, plan . . . or absence of mistake or accident."

Federal Rule of Evidence 608(b) provides, in part: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence."

Federal Rule of Criminal Procedure 33 provides, in part: "The court on motion of a defendant may grant a new trial to him if required in the interest of justice . . . A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment. . . .

Section 2255 of the federal Judicial Code, 28 U.S.C., provides, in part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. . . .

STATEMENT OF THE CASE

This case arose out of an incident which occurred June 2, 1982, at the Blue Ribbon Tavern in Bridgeport, Connecticut. The Blue Ribbon housed a juke box and pinball machine rented from Hawley Enterprises, of which the petitioner, Gus Curcio, was principal owner. Earlier that day the proprietor of the Blue Ribbon had purchased a video game from another supplier. Shortly before 11 that night, petitioner and three others drove to the vicinity of the tavern. Two of them then entered the Blue

Ribbon, and while one stood in the doorway brandishing a gun, the other, wearing a bag over his head, smashed the new video game with a sledge hammer. The two intruders then left the bar and returned to their parked car, leaving the hammer imbedded in the machine.

James Hawley, a codefendant and part owner of Hawley Enterprises, testified in his own defense at trial that he was the gunman. He explained he had entered the Blue Ribbon with one Dahill D'Onofrio, also a part owner of Hawley Enterprises but who was not a defendant. Hawley testified that he drew the gun to protect and defend D'Onofrio from angry patrons of the bar, after D'Onofrio, for no apparent reason, had smashed the video game with a hammer. D'Onofrio then testified, agreeing that it was he and Hawley who had entered the Blue Ribbon. He stated that he intended to discuss business with the owner, but could not locate him and, having had too much to drink, this upset him. Noticing the video game and thinking it was a Hawley machine, he testified that he decided to check and see how much money it contained. Further aggravated by a customer's failure to stop playing the video game and get out of the way. D'Onofrio testified, he grabbed a hammer from behind the bar and smashed the machine.

The government contended that the hooded hammer-wielder was not D'Onofrio but Gus Curcio, the petitioner. On direct appeal, petitioner's conviction and ensuing seven year sentence for attempted extortion in violation of the Hobbs Act, 18 U.S.C. §1951, were affirmed. *United States v. Curcio*, 759 F.2d 237 (2d Cir. 1985) (Appx. C.)[1] At issue in that appeal was the propriety of the prosecutor's cross-examination of the defense witnesses Hawley and D'Onofrio concerning two incidents involving dissatisfied customers of Hawley Enterprises which

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1. That sentence also includes a $10,000 committed fine and runs consecutively to a ten-year sentence imposed in the same district in an extortionate extension of credit case (D.Conn., Crim.No. N-82-4). A separate ten year sentence for feigning illness during that trial — an "endeavor to obstruct justice" (D.Conn., Crim.No. N-84-47) — runs consecutively to it. Petitioner is thus serving an aggregate term of 27 years, of which the sentence underlying this petition represents the middle seven.

had occurred in December 1979 (the Subalpino Club) and December 1981 (Axelrod's San Francisco Emporium). Before asking these questions, the prosecutor had no reason to expect the witnesses would admit that they or the petitioner were involved at all in these events; as it turned out, the witnesses denied any knowledge or participation. The Subalpino and Axelrod's incidents were neither so similar to the Blue Ribbon events that they could be said to tend to prove identity, nor were they supposed to have involved Curcio, D'Onofrio or Hawley personally. This highly prejudicial questioning was permitted on the theory that the evidence to be elicited would be probative of the defendants' plan and intent. *See* Fed.R.Evid. 404(b). App. A-16 to A-24.

Because the cross-examination was expected to produce at most an admission that the witnesses had heard of the other incidents (not that they or the petitioner were involved in or even responsible for them), the district judge permitted the questions only on the prosecutor's representation that their factual premises would be established on rebuttal by admissible evidence. However, the prosecutor then did not call the promised witnesses, representing to the trial court (and later to the court of appeals) that they had gone into hiding and were unavailable.[2] Pertinent portions of the cross-examination and surrounding colloquy appear in Appendix E.

On direct appeal, the contested cross-examination was held proper on the theory that it was "intended . . . to probe into the plausibility of the version of events at the Blue Ribbon given at trial by Hawley and D'Onofrio." 759 F.2d at 241; Appx. C. The court explained this theory as follows:

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2. The district court then ordered the cross-examination stricken and instructed the jury to disregard it. A-28 to -29. The court of appeals, however, ruled that the questioning had been proper, not that it had been rendered harmless by the court's later actions. *See* 759 F.2d at 241 ("defendants obtained a ruling more favorable than warranted"). Given the nature of the questions, a harmless error disposition would be difficult to justify.

> If the jury were to accept the testimony that D'Onofrio rather than Curcio destroyed the machine, it might reasonably consider why the prior incidents had not alerted Hawley and D'Onofrio to the peculiar vulnerability of dissatisfied Hawley customers to violence and led them to have behaved more cautiously at the Blue Ribbon, if not to have avoided it altogether. While the relationship of such prior incidents to the events at the Blue Ribbon would normally be attenuated (apart from proving the element of instilling fear), the unusual version of those events offered by the witnesses justified the cross-examination to test the claimed lack of intent.

Id. Thus, although the Court of Appeals never said so explicitly, the questioning was deemed proper as to Hawley under Fed.R.Evid. 404(b) to prove his intent but as to D'Onofrio, whose intent was not in issue between the parties, apparently only to challenge his credibility.

This petition arises out of a motion for new trial filed about two years later, supported by affidavits which demonstrated that the prosecutor had misled the court about the availability of the rebuttal witnesses, some of whom were even in the courthouse under government subpoena during the trial.[3] (Another was said to have been readily locatable through his nephew.) Moreover, the prosecutor's own opposing affidavit revealed that on June 12, 1984, at the time he represented to the court that he would produce witnesses to the Subalpino and Axelrod's incidents, he had none of the witnesses under subpoena and therefore could not in good faith predict he would be in a position to call them. The affidavits further showed the prosecutor never had a basis to represent, as he had done, that the witnesses had "gone into hiding," a statement relied upon by the court of appeals in its direct affirmance as "satisfactorily explain[ing]," 759 F.2d at 240; Appx. C, the failure to call them. The motion and its supporting and opposing papers thus suggested that the cross-examination was conducted for its inflammatory effect, and not in the good

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3. The motion also advanced a *Brady v. Maryland* claim which is not being pursued in this Court.

faith expectation of damaging the defense witnesses' credibility or proving Hawley's intent, much less the petitioner's.

Judge Burns nevertheless denied the Motion without a hearing. Disregarding the affidavits, the court unaccountably ruled that "Defendant presents no evidence to support the allegation that the government either knew Mr. Celon [the Subalpino bartender] was unavailable all along, or deliberately chose not to call available witnesses." Appx. B, at 4.

The court of appeals affirmed on an entirely different theory. The appellate court held that the claim of prosecutorial misrepresentation was immaterial, because the affirmance on direct appeal had been premised on a conclusion that the critical cross-examination was proper regardless of the availability of confirming witnesses. Moreover, the court concluded, the admission of extrinsic evidence of the other incidents would have been prejudicial, not helpful, to Curcio's defense, and therefore he was not harmed by the prosecutor's failure (or decision) not to call the rebuttal witnesses. 826 F.2d at 197; Appx. A. Neither court below appeared to recognize that petitioner's essential claim was that the inflammatory cross-examination of the defense witnesses should never have been allowed at all, not that it should have been allowed to be buttressed by further witnesses, and that it would not have been allowed had the prosecutor not misrepresented to the trial court what witnesses he either could or would call.

REASONS FOR GRANTING THE WRIT

1. This case offers an opportunity to clarify language in the Court's 1984 *Cronic* opinion that is inconsistent with the settled construction of Federal Criminal Rule 33.

Invoking Fed.R.Crim.P. 33, petitioner's counsel filed a pleading, denominated as a Motion for a New Trial, almost two years after entry of the judgment of sentence. It seems clear, however, that at least the part of the motion giving rise to the issues presented in this Court (see note 3 above) did not involve the discovery of "evidence" in the sense of information which would have been admissible at trial. The newly-discovered

"evidence" supporting the motion was instead the defendant's post-appeal proof of a prosecutorial misstatement which had laid the groundwork for a critical, unfavorable evidentiary ruling and that ruling's appellate affirmance.

Since neither the fact that the prosecutor had falsely represented his ability or intention to call a witness nor the fact that certain potential witnesses had been available but not called would be admissible at a new trial, the motion did not concern "evidence" within the meaning of Rule 33. See, *e.g.*, *United States v. Dukes*, 727 F.2d 34, 38 (2d Cir. 1984) (neither ineffective assistance nor prosecutorial misconduct qualifies as "newly discovered evidence"); *United States v. Lara-Hernandez*, 588 F.2d 272, 275 (9th Cir. 1978); *United States v. Ellison*, 557 F.2d 138, 133 (7th Cir.), *cert. denied*, 434 U.S. 450 (1977); compare *United States v. Brown*, 476 F.2d 933, 935 (D.C.Cir. 1973). *See generally* 8A Moore's Federal Practice ¶33.03[1], at 33-19 to -20 (1987 rev. M. Waxner *et al.*); 5 M. Rhodes, Orfield's Criminal Procedure Under the Federal Rules §§33.30, -.38, -.39, at 313-17, 330-34 (2d ed. 1987); 2 C. Wright, Federal Practice and Procedure: Criminal §557, at 315-40 (2d ed. 1982). Thus, the motion was more properly characterizable as a motion to vacate sentence on the basis of prosecutorial misconduct arising under 28 U.S.C. §2255, and the lower courts were bound to treat it accordingly, regardless of label.

In *Andrews v. United States*, 373 U.S. 334, 338 (1963), this Court unanimously held that a court of appeals, considering its jurisdiction of an appeal that would be unauthorized if deemed taken from the denial of a motion under Fed.R.Crim.P. 35, is required to treat the motion as if it had been brought under §2255.[4] As the Court stated, "in this area of the law . . ., 'adjudication upon the underlying merits of claims is not [to be] hampered by reliance upon the titles petitioners put upon their documents.' " *Id.*, quoting the court below.

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4. Under the then-current version of the Criminal Appeals Act, the government had no right of appeal from an unfavorable ruling on a Rule 35 motion. It could appeal under 28 U.S.C. §2253 (as made applicable by §2255), however, from the granting of a 2255 motion.

The same principle has been applied to motions which might be seen as arising either under Rule 33 or under 28 U.S.C. §2255. In *Anderson v. United States*, 443 F.2d 1226, 1227 (10th Cir. 1971), the court ruled that a motion for new trial based on newly discovered evidence, out of time under Rule 33 because filed more than two years after judgment, must be considered under the criteria of §2255 rather than being summarily dismissed. Similarly, in *United States v. Schmidt*, 760 F.2d 828 (7th Cir. 1985), a direct appeal, the court rejected the government's argument that the district court had properly rejected a defendant's post-trial motion to withdraw a trial stipulation on the basis of being untimely under Rule 33. The court held there was no impediment to the consideration of the motion because it could properly have been considered as arising under §2255. *Id.* at 834 n.9. *See also* 28 U.S.C. §1653 (amendment of defective allegation of jurisdiction permissible at any time).

Under §2255, the district court in this case would have been bound to grant a hearing, rather than summarily to dismiss the motion — brought under the "disfavored" post-judgment provision of Rule 33—for lack of sufficient proof. This is because the "files and records of the case" did not "conclusively show that the prisoner is entitled to no relief." 28 U.S.C. §2255(¶3). See *Fontaine v. United States*, 411 U.S. 213 (1973) (per curiam); *Machibroda v. United States*, 368 U.S. 487 (1962); *cf. Blackledge v. Allison*, 431 U.S. 63 (1977). Concomitantly, the denial of the motion would have been subject to a more generous standard of review on appeal. See *United States v. Johnson*, 327 U.S. 106 (1946).

The well-established procedural distinctions between a motion under Rule 33 and one under §2255 have recently been muddied by language in one of this Court's decisions:

> [I]n this case respondent . . . raise[d] his claim [of ineffective assistance of counsel] in the District Court through his motion for new trial under Fed. Rule Crim. Proc. 33. The District Court denied that motion for lack of jurisdiction because the case was pending on direct appeal at the time,

> but that ruling was erroneous. The District Court had jurisdiction to entertain the motion and either deny the motion on its merits, or certify its intention to grant the motion to the Court of Appeals, which could then entertain a motion to remand the case.

United States v. Cronic, 466 U.S. 648, 667 n.42 (1984). The alleged ineffective assistance of Cronic's trial counsel was plainly not "newly discovered *evidence*," within the meaning of Rule 33. Yet it is not evident (although perhaps it should be) that the procedure for remanding a pending appeal which is provided in Rule 33 is applicable to a 2255 motion filed while the appeal is pending. Certiorari should be granted in this case to clarify the language in *Cronic* which tends to confuse the procedural consequences of the overlapping yet not identical post-conviction remedies available to federal prisoners under Fed. R.Crim.P. 33 and 28 U.S.C. §2255.

2. The Court should clarify the ethical duties of federal prosecutors in conducting cross-examination of defense witnesses under Fed.R.Evid. 404(b) which cannot be supported by admissible evidence. The lower courts are in conflict on this question, which should be addressed in tandem with the related question on which certiorari was recently granted in *Huddleston*.

The prosecutor in this case made an unsupportable promise to produce extrinsic evidence of other alleged attacks on dissatisfied Hawley customers by unknown persons, whom he supposed to have been associated with Hawley Enterprises. As a result, the trial judge allowed a line of cross-examination to be pursued with both the codefendant Hawley and the key defense witness D'Onofrio that produced no probative evidence but which created an overwhelming aura of unfair prejudice. The rules of law governing this situation are complex and unsettled. Judge Weinstein characterizes this area as "perplexing" and the cases as "numerous" and often impossible to reconcile. 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶404 [08], at 404-53 (1986). Certiorari should be granted in this case to

resolve them for the edification of federal courts and prosecutors and to protect the fair trial rights of federal defendants.

Satisfied that "the government had in its possession sufficient evidence of the incidents in question," 759 F.2d at 240; Appx. C, or even mere "grounds to believe that the other incidents had occurred," 826 F.2d at 197; Appx. A, the court below ruled that the questioning was proper. For this proposition it cited only the ABA Standards Relating to the Administration of Criminal Justice: The Prosecution Function §5.7(d). 759 F.2d at 240; Appx. C. The court did not specify, however, whether it was relying on the first or second edition of these standards, and the difference between the two on this point is illuminating.

In 1971, the first edition of this ABA standard on "Examination of witnesses" provided, "It is unprofessional conduct to ask a question which implies the existence of a factual predicate which the examiner cannot support by evidence." Under that standard, the cross-examination in this case was improper. In 1979, however, the standard was revised to require only a "good faith belief" in the premise of the question. I ABA, Standards for Criminal Justice, Std. 3-5.7, at 3-84 (2d ed. 1980). The stated reason for the change was that the latter is the "accepted test." *Id*. The cases do not so readily support the less strict formulation.

In *United States v. Harris*, 542 F.2d 1283, 1307 (7th Cir. 1976), the court endorsed the "support by evidence" test. Similarly, in *United States v. Brown*, 519 F.2d 1368 (6th Cir. 1975), the court reversed a conviction on these grounds, articulating a requirement that the prosecutor be "prepared to prove" the prejudicial allegations. *Id*. at 1370. The Tenth Circuit has also recently adopted that test. *United States v. Silverstein*, 737 F.2d 864, 868 (1984). See also *Foster v. Barbour*, 613 F.2d 59, 60-61 (4th Cir. 1980) (grant of habeas affirmed on due process grounds for this reason). Each of these cases, in turn, cites earlier precedent from the same circuit as confirming the relevant standard. Even the treatises are in conflict: *compare* E. Imwinkelried, Uncharged Misconduct Evidence §9:53, at 9-100 (1984) ("good faith basis"), *with* B. Gershman, Prosecutorial

Misconduct §9.4(a), at 9-21 to -22 (1987) ("knows he cannot support by evidence"). The standard applied in the decision below is thus in conflict with that which would apply in at least four other circuits, and the correct formulation of the test is a controversial issue of constitutional dimension.

The error which occurred in this case had a particularly unfair and harmful impact. The sufficiency of evidence to show petitioner's participation was very much in doubt. It depended, in large measure, on the jury's evaluation of the credibility of the witness D'Onofrio, who confessed that it was he, not the petitioner, who entered the Blue Ribbon with Hawley and then smashed the video machine. The questioning of D'Onofrio violated the due process and ethical standards applicable to a federal prosecutor's attempts to inject 404(b) material through hostile cross-examination.

Neither petitioner's nor D'Onofrio's intent or plan, after all, was a contested issue at the trial. True enough, the defense theory was that D'Onofrio entered the bar and smashed the machine without criminal intent; but the government contended that D'Onofrio was not inside the Blue Ribbon at all.[5] Similar acts — even if the Subalpino and Axelrod's accusations qualified as similar or could be tied to petitioner personally rather than by attenuated implication through his company — were thus only useful on a theory of impeaching D'Onofrio's credibility, and for that purpose the extrinsic evidence was wholly inadmissible. Fed.R.Evid. 608(b). Accordingly, as to the witness D'Onofrio, the prosecutor had to be prepared to accept his answers to the cross as given. In that situation, a mere "good faith basis" test is an invitation to trial by innuendo from denied questions, just as happened here. Given the slight evidence of any guilty involvement by petitioner, the result was a fundamentally unfair trial, made possible only by the prosecutor's knowingly or recklessly false statement to the court.

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5. The government contended that petitioner Curcio was the hooded man with the hammer. There was no conspiracy or RICO charge, nor any theory of aiding and abetting advanced in this case, nor was Hawley Enterprises on trial. Thus, there was no accessorial or vicarious liability of any kind at issue.

The cross-examination of the codefendant Hawley presents a different aspect of the problem. His intent and/or plan truly were in issue at trial. Extrinsic evidence would thus have been admissible under Rule 404(b) for these purposes, although not to impeach under 608(b). Yet there was no evidence the prosecutor could expect to offer that would have tied Hawley to the Axelrod's or Subalpino incidents, any more than there was evidence to tie in the petitioner. A mere "good faith basis" test in this situation again invites unfairness.

The application of too lax a standard by the court below not only permitted a violation of proper prosecutorial ethics, but was compounded on the facts of this case by the prosecutor's representation, at least reckless and perhaps knowingly false, that he would call the witnesses to the two other incidents. On this basis alone, the trial court allowed the questioning, as is made clear by the judge's order to strike the disputed cross when the extrinsic evidence did not materialize. And the court of appeals made reference to the witnesses' sudden "unavailability" as "explaining" the failure to call them. The affidavits in support of the motion for new trial, of course, called those claims into question, and petitioner offered to prove the prosecutor's representations about the witnesses to have been false. Yet the motion was summarily denied and the denial affirmed without any discussion of the pertinent and difficult questions presented.

In addition, this Court has recently granted certiorari to review the decision in *United States v. Huddleston*, 811 F.2d 974 (6th Cir. 1987) (per curiam), *on rehearing from* 802 F.2d 874 (1986). See *Huddleston v. United States*, 42 Crim.L.Rptr. 4038 (Oct. 13, 1987) (No. 87-6). That case presents the closely related questions whether the standard for admissibility of Rule 404(b) "other acts" evidence is by a preponderance or must be "clear and convincing," as well as the proper application of the harmless error rule to this situation. Granting certiorari in the instant case also would permit the Court to consider more fully during this Term the procedural ramifications of Fed.R.Evid. 404(b). For these reasons as well, the writ should be granted.

CONCLUSION

For each of the foregoing reasons, petitioner GUS CURCIO prays that this Court grant his petition for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

PETER GOLDBERGER
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Attorneys for Petitioner

November 12, 1987.

APPENDIX

APPENDIX A

826 F.2d 196

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1362—August Term, 1986

(Argued August 13, 1987 Decided August 17, 1987)

Docket No. 87-1149

UNITED STATES OF AMERICA,

Appellee,

—v.—

GUS CURCIO,

Defendant-Appellant.

Before:

WINTER and MAHONEY, Circuit Judges,
and RE,* *Chief Judge*.

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* The Honorable Edward D. Re, Chief Judge for the United States Court of International Trade, sitting by designation.

Defendant appeals from an order of the United States District Court for the District of Connecticut (Ellen B. Burns, *Judge*) denying his motion for a new trial.

Affirmed.

MERVYN HAMBURG, U.S. Department of Justice, Washington, D.C. (Stanley Twardy, United States Attorney, New Haven, Connecticut, of counsel), *for Appellee*.

ANDREW B. BOWMAN, Westport, Connecticut, *for Defendant-Appellant*.

PER CURIAM:

Gus Curcio appeals from Judge Burns' denial of his motion for a new trial. The underlying conviction to which the motion was directed was affirmed by this court in a published opinion, *United States v. Curcio*, 759 F.2d 237 (1985), familiarity with which is assumed.

Curcio's motion raised two claims. First, he argues that a new trial should have been granted on the ground that the government was in fact able to produce extrinsic evidence of so-called "other crimes evidence" and that it misled the district court, and thereafter this court, in asserting that the witnesses to those events were not available at trial. In support of this claim, Curcio offered evidence that some witnesses to the so-called other crimes were not only available but were in the courthouse at the time of trial and that other witnesses were available if reasonable steps had been taken to locate them.

Curcio's argument, however, misapprehends the basis of our previous decision. In that decision, we stated that the failure to offer live testimony was relevant only to whether there was a factual basis for the cross-examination of defense witnesses regarding incidents of violence involving customers dissatisfied with Hawley machines, *Id.* at 240. Because we viewed the issue as involving the propriety of cross-examination testing the

credibility of those witnesses rather than the admissibility of evidence of other crimes, we held that the cross-examination was proper if it had a factual basis, whether or not the government introduced extrinsic evidence. We thus noted, "[t]he cross-examination was not intended to demonstrate any such direct involvement [in the other crimes] . . . but rather to probe into the plausibility of the version of events . . . given at trial by [defendant's witnesses]." *Id.* at 241. Whether the government did or did not produce extrinsic evidence of the other crimes is thus irrelevant to the propriety of the cross-examination so long as government counsel had grounds to believe that the other incidents had occurred. Our examination of the record before us on the prior occasion led us to conclude that government counsel had ample grounds to believe the other incidents of violence had occurred. *See id.* at 240-41. The record now before us reinforces that conclusion.

Finally, we fail to perceive how Curcio would be helped in his defense by the introduction of extrinsic evidence of other acts of violence involving Hawley machines. In light of the fact that there is no evidence directly connecting him to that violence, *see id.* at 241, we would have expected him to argue that even if the cross-examination was, as we have held, proper, extrinsic evidence of the other incidents was inadmissible.

Curcio's second claim is that the government failed to disclose to the defense that FBI agents had promised assistance in straightening out a local police investigation involving stolen credit cards to a witness who testified for the prosecution at Curcio's trial. In support of this claim, Curcio has submitted the transcript of a phone conversation between a defense investigator and the eyewitness. In response, the government submitted affidavits from the FBI agents in question denying that any such assistance had been promised. Judge Burns rejected this claim without holding an evidentiary hearing. We believe she was correct in doing so. The phone conversation simply does not support the claim that the eyewitness had been promised assistance by the FBI in resolving his problems with local police in exchange for his cooperation. The phone conversation was, as

the investigator himself noted while talking to the witness, quite confusing. The most informative portion reads as follows:

> INVESTIGATOR: You know how the FBI became aware of this credit card situation?
>
> WITNESS: They never brought it up exactly, they just said if I have any problems or ever have any problems, you know.
>
> INVESTIGATOR: So they weren't referring to this credit card situation specifically.
>
> WITNESS: No. They just you know.
>
> INVESTIGATOR: In other words, you assumed, you came to that conclusion.
>
> WITNESS: Yea, I kinda figured they must have known, you know.
>
> INVESTIGATOR: So that in truthfulness it could also be that the police never really did have a case against you for these credit cards?
>
> WITNESS: It could be that, I mean.

Curcio's evidentiary submission in support of his claim of an undisclosed promise of assistance is thus insufficient on its face. The witness at best speculated about knowledge the FBI might have had and, as Judge Burns concluded, did not state "that the FBI knew about the credit card arrest, much less helped [him] evade prosecution for that offense."

We therefore affirm.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
v.	:	CRIMINAL NO.
GUS CURCIO	:	N-83-59(EBB)

RULING ON MOTION FOR A NEW TRIAL

On September 8, 1983, a grand jury indicted defendant Gus Curcio and co-defendant James Hawley for violating 18 U.S.C. §1951, the Hobbs Act. On June 15, 1984, a jury found the defendants guilty as charged. On July 20, 1984, the court sentenced Curcio to seven years imprisonment. The Second Circuit Court of Appeals affirmed defendant's conviction on April 5, 1985, reported at *United States v. Curcio*, 759 F.2d 237 (2d Cir. 1985). Defendant Curcio now has moved for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. For the reasons discussed below, defendant's motion is denied.

Defendant's claims involve alleged misrepresentations by the government and failure by the government to comply with discovery orders. The defendant first contends that the government knowingly made misrepresentations to the trial court regarding potential witnesses. When cross-examining defense witness Dahill D'Onofrio and co-defendant Hawley, the government was allowed to delve into other crimes based on its representation to the court that witnesses would be brought in to substantiate the questioning. The government never produced these witnesses. According to the defendant, the government either knew that the witness was unavailable, as in the example of Anthony Celon, or chose not to call available witnesses, Bruno Phillipini, Sid Wilson, and Melvin Axelrod. This misrepresentation allegedly allowed the government to introduce irrelevant and prejudicial evidence that deprived Gus Curcio of due process of law and a fair trial. Moreover, the defendant argues, the government's inquiry into similar crimes, based on the reckless misrepresentation of producing witnesses

not yet under subpoena, produced the exact prejudice condemned in *United States v. Figueroa*, 618 F.2d 934 (2d Cir. 1980).

[Description of second claim omitted.]

The government's response emphasizes the complete lack of evidence supporting either claim. In regard to Anthony Celon, defendant merely alleges, with no offer of proof, that the government knew Mr. Celon was not available. There is no evidence that the government was acting deceptively in its representations to the court. Moreover, the government argues that Mr. Celon's testimony was the predicate to that of either Mr. Phillipini or Mr. Wilson. Without Mr. Celon, the government could not bring forth Mr. Phillipini or Mr. Wilson.

In regard to Melvin Axelrod, the government again argues the lack of concrete evidence supporting defendant's position. Defendant has presented nothing to support the claim that Mr. Axelrod was in Connecticut or Florida, and available to testify. The government contends that the issue of the potential witnesses not being under subpoena when the representation was made in court is the proverbial red herring. The government notes that, not only was this issue discussed in the appellate brief to the Second Circuit, but that the Second Circuit specifically cited *Figueroa, supra*, 618 F.2d 934, in approving of the government's conduct in the instant case. *Curcio, supra*, 759 F.2d at 240. Overall, the government further contends that the court's curative instruction, striking cross-examination and telling the jury to disregard it, adequately protected defendant's right to a fair trial.

[Response to second claim omitted.]

Discussion

A motion for a new trial is generally disfavored by the courts and therefore must be approached cautiously. *See United States v. Adi*, 759 F.2d 404, 407 (5th Cir. 1985); *United States v. Gilbert*, 668 F.2d 94, 96 (2d Cir. 1981); *United States v. Sposato*, 446 F.2d 779, 781 (2d Cir. 1971). Such a motion "is

addressed to the discretion of the trial court." *Sposato, supra,* 446 F.2d at 781. Moreover, the newly discovered evidence on which a motion for a new trial is based must be of an exculpatory nature, not merely of impeachment value. *See Adi, supra,*759 F.2d at 407; *Gilbert, supra,* 668 F.2d at 96; *Sposato, supra,* 446 F.2d at 781.

The court finds defendant's argument about governmental misrepresentation at trial unpersuasive. Defendant presents no evidence to support the allegation that the government either knew Mr. Celon was unavailable all along, or deliberately chose not to call available witnesses. The court finds that *Figueroa, supra,* 618 F.2d 934, does not apply to the instant case. Moreover, when the government notified the court that it could not present the witnesses, the court issued a curative instruction which sufficiently protected defendant's right to receive a fair trial. The court concludes defendant Gus Curcio is not entitled to a new trial because of alleged misrepresentations made by the government.

[Discussion of second issue omitted.]

The court finds no basis proffered for either of the defendant's claims. Therefore, there is no need for an evidentiary hearing and the motion for a new trial is denied.

SO ORDERED.

/s/ Ellen B. Burns

ELLEN BREE BURNS
UNITED STATES DISTRICT JUDGE

Dated at New Haven, Connecticut, this 20th day of February, 1987.

APPENDIX C

UNITED STATES of America, Appellee,

v.

Gus CURCIO, Appellant.

UNITED STATES of America, Appellee,

v.

James HAWLEY, Apellant,

Nos. 703, 704, Dockets 84-1261, 84-1263.

United States Court of Appeals,
Second circuit.

Argued Jan. 22, 1985.

Decided April 5, 1985.

Cite as 759 F.2d 237 (1985)

Andrew B. Bowman, Westport, Conn., for appellant Gus Curcio.

David S. Golub, Stamford, Conn. (Leora Herrmann, Silver, Golub and Sandak, Stamford, Conn., of counsel), for appellant James Hawley.

John H. Durham, New Haven, Conn., U.S. Dept. of Justice, (Alan H. Nevas, U.S. Atty., D. Conn., William A. Keefer, U.S. Dept. of Justice, New Haven, Conn., of counsel), for appellee.

Before VAN GRAAFEILAND, MESKILL and WINTER, Circuit Judges.

WINTER, Circuit Judge:

Defendants appeal from a conviction for attempting to violate the Hobbs Act, 18 U.S.C. §1951 (1982), after a jury trial before Judge Burns. We reject their various claims of error during the trial and affirm.

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BACKROUND

The prosecution's case concerned events that occurred on June 2, 1982, at the Blue Ribbon Tavern in Bridgeport, Connecticut, an establishment owned by one William Kozakiewicz. Earlier that day, his brother-in-law had purchased a video game in New Jersey and had installed it in the Blue Ribbon. The Blue Ribbon already contained a pool table and pinball machine owned by Kozakiewicz and a juke box and another pinball machine rented from Hawley Enterprises. Hawley Enterprises was engaged primarily in the business of renting vending machines and was owned principally by the defendant Gus Curcio. The defendant Hawley and an employee of the Hawley firm, one Dahill D'Onofrio, were also part owners.

The government's proof showed that at approximately 10:45 p.m. on June 2, the two defendants, along with D'Onofrio and two others, double parked a Cadillac El Dorado near the Blue Ribbon. Hawley and one of the occupants of the car entered the bar. Although the defense disputes the sufficiency of the government's identification evidence, a reasonable jury could have concluded that the other person was the defendant Curcio. After entering, Hawley stood in the doorway, drew a .357 magnum revolver, and warned the patrons of the Blue Ribbon not to move. Curcio, who had a plastic bag over his hand, smashed the new video game with a sledge hammer he had brought with him. Leaving the hammer imbedded in the game, the defendants exited the bar and returned to the El Dorado.

While the defendants were running towards their car, a Bridgeport Police Department patrol car came down the street. The officers in the car saw two individuals running towards the double parked El Dorado and a crowd milling around in front of the bar. After a patron yelled that the two men running down the street had just smashed up the bar, the officers pursued the now moving El Dorado. Notwithstanding the pursuit by a police car with flashing lights, the El Dorado proceeded for three and one half blocks and ran one stop sign before pulling over. Curcio then got out of the car from the driver's seat and told the police officers that they could not arrest him because he was Gus

Curcio. Unpersuaded, the police officers arrested him and his compatriots. A search of the car revealed a .357 magnum registered to Hawley, a .38 revolver registered to another occupant and Hawley employee, Kent Toresso, and a plastic bag. Both guns were loaded with hollow point bullets.

The next day the video game was removed from the Blue Ribbon. Since that time, Kozakiewicz, who reluctantly testified that he "got the message,"[1] has obtained vending machines only from Hawley Enterprises, except for one machine rented from a Bridgeport police officer.

Hawley took the stand in his defense and admitted that he went into the bar and pulled his gun. However, he stated that he went into the bar with D'Onofrio, not Curcio, and that he was there to buy cigarettes, not smash the video game. He stated that D'Onofrio smashed the machine for no apparent reason, and he had pulled his gun only because he thought the patrons were going to attack D'Onofrio.

D'Onofrio then took the stand and also testified that he and Hawley, not Curcio, had gone into the bar. He stated that he went into the bar to discuss wholesale cigarettes with the owner and got upset when he couldn't locate the owner. He testified that he had noticed the video game on his way in and thought it was owned by Hawley Enterprises. Frustrated in his search for the owner, D'Onofrio claimed to have decided to see how much money was in the machine, and because someone was playing the machine, he became further aggravated and grabbed a hammer from behind the bar which he used to smash the game.

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1. In a post trial memorandum, the district court stated:

The restaurant owner Kozakiewicz, called as a government witness, testified favorably to the defendants but at odds with his previous testimony before the grand jury. The jury could have found, as the court would have, that much of his courtroom testimony was incredible. While he testified, Kozakiewicz's hands shook; he sat uneasily in the witness box; and he avoided looking in the direction of the defendants' table. Nevertheless, and albeit with apparent reluctance, Kozakiewicz testified, and the jury could believe, he had "got the message" not to use any non-Hawley machines.

D'Onofrio, whose version of events was bizarre, if not implausible on its face, was contradicted in numerous material particulars by other witnesses. Moreover, he admitted that a state court plea bargain in the Blue Ribbon incident had resulted in no additional time being added to sentences he was already serving for unrelated crimes. He also conceded that he could no longer be prosecuted for smashing the video game.

The government attempted to cross-examine both witnesses regarding two other incidents involving non-Hawley vending machines in local bars. According to the government's offer of proof, each incident involved a bar which had a Hawley vending machine but wanted it removed because the machine was not working. When Hawley failed to repair the machines, both bars then removed the Hawley machine from the premises after so advising the Hawley company. One bar replaced the Hawley machine with a machine from a competitor. Four masked gunmen vandalized one of the bars and beat up the bartender shortly after the Hawley machine was removed. In the case of the other bar, a masked gunman smashed the non-Hawley machine. However, the government conceded that the only evidence directly linking Curcio, Hawley or D'Onofrio to either incident was a threatening phone call in the case of the second bar by a caller identifying himself as Gus Curcio.

In a colloquy with the court, the government argued that evidence of these incidents was admissible under Fed.R.Evid.R. 404(b)[2] to show criminal intent and the lack of a mistake in the destruction of the video game at the Blue Ribbon. The government stated its intention, should the district court rule favorably to it, to provide witnesses to testify about these incidents should cross-examination fail to elicit satisfactory answers. Defendants offered numerous arguments against both cross-examination and admission of extrinsic evidence, their

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2. Rule 404(b) states:

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

principal claims being that the prejudicial effect of the jury's learning of the other incidents outweighed any probative value and that neither Rule 404(b) nor Rule 608(b)[3] applied because of the lack of any direct proof implicating Hawley or D'Onofrio in the incidents. The court thereupon permitted the government to cross-examine about the other incidents but indicated its view that a factual basis for the cross-examination had to be shown in the government's rebuttal.

The cross-examination thereupon proceeded, and Hawley admitted that a Hawley machine had been removed from one of the bars in question but denied knowledge of a dispute. He also denied knowledge of any business dealings with the other bar. D'Onofrio admitted that Hawley machines had been removed from both bars but also denied knowlede of any dispute in either case.

As already mentioned, the government represented that it would offer witnesses to the two incidents, and the district court permitted the cross-examination in light of that representation. However, the government had not subpoenaed the witnesses in question at the start of the trial, apparently because such evidence would be inadmissible as part of its main case under *United States v. Figueroa*, 618 F.2d 934 (2d Cir. 1980) (evidence of similar crimes refuting the possibility of mistake or lack of intent not admissible until such matters are put in issue). Once it became clear that the testimony of these witnesses might be admitted, the government attempted to locate them but they could not be served with process. After the government informed the court that the witnesses had "gone into hiding," the

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3. Rule 608(b) states:

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

district court struck the cross-examination and admonished the jury to disregard it.

DISCUSSION

The principal issue on this appeal is the propriety of the cross-examination of Hawley and D'Onofrio with regard to other incidents of violence directed at taverns which had caused Hawley machines to be removed. Defendants argue that the government's failure to present evidence either of the incidents or of the defendants' or D'Onofrio's involvement therein renders the cross-examination impermissible as lacking a basis in fact and as irrelevant. We disagree.

Dealing first with the question of whether the cross-examination was factually unfounded, we note that the issue is not resolved by the government's failure to offer live testimony in support of the factual assumptions underlying the questions. That failure was satisfactorily explained by the disappearance of the witnesses in question, and no claim is made that in fact they were available at the pertinent time. The issue is rather whether the government had in its possession sufficient evidence of the incidents in question to justify posing questions based on such damaging factual assumptions, *see ABA Standards Relating to the Administration of Criminal Justice: The Prosecution Function* §5.7(d).

We have examined the record, including the Jencks material turned over to the defense before trial, and have concluded that a good faith and objectively reasonable basis for the cross-examination clearly existed. FBI and local police investigative reports relating to both incidents, and grand jury testimony with regard to one incident, provided ample grounds to believe that disputes over Hawley machines had resulted in violence in the bars in question. The material was available to the defense before the cross-examination got under way, and the only objection made as to the factual predicates for the questions related to the lack of proof that the defendants or D'Onofrio had committed or ordered the violent acts. However, because the questions contained no implications about any such direct

involvement, this objection went to relevance rather than to a lack of a good faith factual foundation for these questions. We reject, therefore, the claim that the cross-examination was factually unfounded.

We also reject the claim that it was irrelevant or unduly prejudicial. It is true that there is no direct evidence that Hawley or D'Onofrio either ordered or committed the violence on the prior occasions. The cross-examiniation was not intended to demonstrate any such direct involvement, however, but rather to probe into the plausibility of the version of events at the Blue Ribbon given at trial by Hawley and D'Onofrio. Hawley was a part owner and President of Hawley Enterprises. D'Onofrio was also a part owner and a self-described "problem solver" for the firm. There was evidence that each was aware of the locations of Hawley machines and intimately familiar with the business of the firm. Under such circumstances, cross-examination with regard to prior violence reasonably designed to forestall competitive inroads on Hawley Enterprises' business was a proper testing of the credibility of the spur of the moment, crime of passion version of events at the Blue Ribbon. If the jury were to accept the testimony that D'Onofrio rather than Curcio destroyed the machine, it might reasonably consider why the prior incidents had not alerted Hawley and D'Onofrio to the peculiar vulnerability of dissatisfied Hawley customers to violence and led them to have behaved more cautiously at the Blue Ribbon, if not to have avoided it altogether. While the relationship of such prior incidents to the events at the Blue Ribbon would normally be attenuated (apart from proving the element of instilling fear), the unusual version of those events offered by the witnesses justified the cross-examination to test the claimed lack of intent. Since Judge Burns instructed the jury to disregard the questioning, defendants obtained a ruling more favorable than warranted.

[Discussion of other issues omitted.]

Affirmed.

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-296

GUS CURCIO,

Applicant,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari is the above-entitled cause be, and the same is hereby, extended to and including November 15, 1987.

/s/ Thurgood Marshall

Associate Justice of the Supreme Court of the United States

Dated this 15th
day of October, 1987.

APPENDIX E

[CROSS-EXAMINATION OF JAMES HAWLEY — 6/12/84]

Q With respect to Hawley Enterprises, sir, you've indicated you've been associated with Hawley Enterprises for some ten years, isn't that right?

A That's correct.

Q This is not the first instance, is it, sir, where somebody who has brought in a competitor's machine in to their business has —

MR. MINOGUE: Objection.

(Whereupon the following discussion was heard at side bar:)

* * * *

MR. BOWMAN: Well, what is it offered for? First of all, it's obviously other crimes in evidence and the question is what is it offered for?

MR. DURHAM: That it was not a mistake, spontaneous act, accident, spur of the moment action on the part of Hawley Enterprises.

MR. BOWMAN: Can you prove who did it? I mean, can you show who was the person who smashed the machine, who the competitor was to show there was some reason for a cause and effect relationship? Because if you can't, I object and I move for a mistrial. I think Mr. Durham has deliberately made a conscious attempt to bring other crime evidence which is not admissible in here. He can't show that it was my client.

MR. DURHAM: I think what I can show, your Honor, is that on at least two other instances where somebody complained to Hawley, complained to Hawley Enterprises about a machine and it took the machine out of its business, got a call from Hawley Enterprises reminding them of who they were, and within a matter of twenty-four hours, had fourteen people come into the bar, beat the individual up,

including beating him in the side with an ax handle and smashing the interior of the bar, including knocking down bottles.

In the second instance, the individual no longer wanted a Hawley machine in his establishment, he wanted a new updated video machine. Hawley didn't bring a new updated video machine, so they dealt with a competitor, S & S Amusement. They brought that machine in and within a very short period of time after S & S brought the machine in, somebody arrived on the scene to smash the screen out of that video machine with some type of blunt object.

* * * *

MR. DURHAM: I will tell you specifically that Gus Curcio called up one place and said, "Do you know who you're f'ing talking to and do you know who this is? This is Gus Curcio and don't forget it." And the next day, the events that I discussed occurred where they came.

MR. BOWMAN: Are you saying you're going to bring these people in here to testify to that?

MR. DURHAM: Yes.

MR. BOWMAN: Well, I object to this, your Honor. It's other crimes evidence. It's absolutely prejudicial. It completely outweighs the probative value of any of this information. Hawley is not disputing that he was there.

THE COURT: He isn't disputing that this was planned?

MR. BOWMAN: He is disputing that.

THE COURT: There was no intent on the part of Hawley?

MR. BOWMAN: That's correct.

THE COURT: What's the rule?

MR. DURHAM: 404(b).

* * * *

Mr. Bowman: Well, I don't know what the answer may be, whether Mr. Hawley will remember it or he won't, whether he knows anything about it or doesn't know anything about it. But if it pertains to any crime, I object to it. And I think that the injection of this kind of imflammatory material in this trial is going to prejudice my client's right to have a fair trial. It's unnecessary and I strenuously object to it, and I move to strike the question. All I can say is that if, depending what the answer is, there'd better be a factual basis for it, I think, in terms of the Government's proof. You know, that's my understanding of the law.

THE COURT: Yes, I would agree with your latter statement, sir, and not with those which went before it.

The objection is overruled. The motion to strike is denied.

MR. BOWMAN: Motion for mistrial?

THE COURT: Motion for mistrial also denied.

(Whereupon the jury entered the courtroom.)

BY MR. DURHAM:

Q Sir, I think I had asked you just before the jury was excused whether or not —. Well, withdrawn.

You indicated that you had worked or been associated with Hawley Enterprises for some ten years, is that correct?

A Yes, it is.

Q All right. And so you would have been associated with them, for example, in December of 1981, is that correct?

A December of 1981?

Q Right.

* * * *

Q And to your knowledge, sir, was the machine that was in Axelrod's Emporium damaged in any way within a period of two weeks after this dispute between Hawley Enterprises and Axelrod's Emporium?

A Our machine.

Q Yes.

A It was our machine damaged?

Q No, the non-Hawley machine.

A No. No, of course not.

Q I take it it's your testimony, sir, that if it were smashed within two weeks after the dispute with Hawley Enterprises that you had nothing to do with it?

A That's correct.

Q And you have no knowledge of that?

A I have no knowledge of that.

Q You do have knowledge of the fact that there was a non-Hawley machine brought in there when you were asked to get your machine out?

A No. I found out when my movers went down to pick up our machine. They said there was another machine in there, they didn't know from what origin, and then that ours was stolen or wasn't around.

Q It's your testimony though that you had nothing to do with that?

A Do with what, sir?

Q If that machine were destroyed?

A If it was destroyed?

Q You had nothing to do with it?

A Of course not.

Q And this was news to you?

A Yes.

Q How about, sir, going back into 19—

MR. BOWMAN: Your Honor, I renew my previous objections and move to strike the testimony.

THE COURT: Overruled. Denied.

BY MR. DURHAM:

Q Going back to 1979, sir, do you recall whether or not —. Well, you were associated with Hawley Enterprises in 1979, correct?

A Yes, I was.

Q And I take it you had pretty much the same role in 1979?

A Less of a role.

Q In 1979, sir, do you recall whether or not Hawley Enterprises had a cigarette machine in a place known as the Subalpino Club?

A No, I don't recall.

MR. BOWMAN: Your Honor, I object to the question.

MR. MINOGUE: Similar objection.

THE COURT: Overruled.

BY MR. DURHAM:

Q You don't recall if there was a cigarette machine?

A No, I don't.

Q Do you recall an incident, sir, where individuals who ran a private club known as the Subalpino Club had called Hawley Enterprises about a cigarette machine that was not working and hadn't worked for some time?

A No, I never remember hearing a call like that, that nature.

* * * *

BY MR. DURHAM:

Q Sir, do you have any recollection, do you know anything about a club in Bridgeport who had complained about Hawley Enterprises cigarette machine, who put the machine out, the machine was destroyed, then themselves having their bar destroyed within a matter of a day or so?

A No, I do not, sir.

MR. BOWMAN: Objection. I object.

THE COURT: Overrruled.

Q You are certainly certain of that, is that correct?

A Yes, I am.

Q You certainly did not have anthing to do with that?

A That is correct.

Q So far as you know, Hawley Enterprises didn't have anything to do with it?

A That's correct.

* * * *

[OVERNIGHT RECESS]

JAMES G. HAWLEY, resuming the witness stand, having been previously sworn, testified as follows:

CROSS-EXAMINATION (Continued) [6/13/84]

BY MR. DURHAM:

Q Mr. Hawley, between the time you testified yesterday afternoon and we recessed until today, have you had occasion, sir, to see whether — has your memory —. Withdrawn.

Between yesterday afternoon and today, have you thought about at all, sir, the relationship that Hawley Enterprises had with Axelrod's Emporium in December of 1981?

A Yes, I did.

Q Do you recall now, sir, whether or not you were aware of a competitor's machine being smashed at Axelrod's Emporium in mid- or the latter part of December, 1981?

MR. BOWMAN: Objection, your Honor.

THE COURT: Overruled.

You may answer.

A Okay. No, I was not.

Q And I take it your testimony, sir, is that Hawley Enterprises had nothing to do with that if it did occur?

A That's correct.

Q And I had also asked you yesterday afternoon, sir, about an establishment known as the Subalpino Club. Do you recall that?

A Yes, you did.

Q Between yesterday afternoon when we recessed and this morning, sir, did anything about the Subalpino Club come to your attention, that is to say do you recall anything about having had a Hawley machine in the Subalpino Club?

A No, I do not. I do not remember having a machine there.

Q And specifically a cigarette machine?

A That's correct.

Q And I take it, sir, your testimony is that you don't know anything about damage that was done at the Subalpino Club shortly after a problem arose in connection with a cigarette machine at the Subalpino Club?

A No, I don't.

* * * *

[CROSS EXAMINATION OF DAHILL D'ONOFRIO]

BY MR. DURHAM:

Q Do you know, sir, whether or not Hawley Enterprises at any time had a video game or any other vending type equipment at an establishment known as Axelrod's Emporium in Westport?

MR. BOWMAN: Objection.

THE COURT: Overrruled.

A Yes.

* * * *

Q Do you recall, sir, whether or not you were ever advised at that time that there was a competitor's machine in the place?

A No, I really don't recall.

Q You're saying that it didn't happen, sir, or you just don't have any recollection?

A I don't have any recollection of it.

Q Do you recall, sir, whether or not you ever became aware of the fact or have any knowledge about that competitor's machine being smashed shortly thereafter?

A No.

Q Also in your capacity, sir, as an employee of Hawley Enterprises involved in accounts receivable, books and records, et cetera, do you know, sir, whether or not Hawley Enterprises had a cigarette machine at a place known as the Subalpino Club in Bridgeport?

MR. BOWMAN: Your Honor, yesterday I objected and I asked the Court to permit me to have a running objection so I don't have to object to each and every question relating to the Subalpino Club.

MR. MINOGUE: Same objection, if your Honor please.

THE COURT: Yes.

* * * *

A I was notified when the machine was found damaged outside, yes.

Q Do you recall, sir, whether or not there had been repeated calls to Hawley Enterprises by persons at the Subalpino Club to have that machine removed because it wasn't working prior to the time it was placed outside?

A No, I have no knowledge of any repair calls or anything like that.

Q Do you recall, sir, whether or not shortly after Hawley Enterprises became aware of the fact that some damage had been done to their machine, do you have any knowledge about anything then happening to the Subalpino Club and, more specifically, the club, the bar, the club being smashed up and destroyed?

A No, sir, I don't.

MR. BOWMAN: Objection. Same objection as yesterday.

Q You have no knowledge of that?

A No.

Q All right. Now, you indicated, sir, you were, however, employed, were you not, at Hawley Enterprises in December of 1979, correct?

A Yes.

Q And in December of 1981?

A Yes.

* * * *

MR. DURHAM: * * * So let me suggest to the Court what the connection is:

Your Honor will recall from the testimony presented thus far in both the Government's case in chief and the defense, it was put on that Mr. Curcio and Mr. Hawley, the principal owners of Hawley Enterprises, which is a vending machine business, that they in fact operated their business whereby

video machines and those sorts of things are put in various establishments. It's quite clear from the testimony presented thus far that Mr. Hawley in particular and Mr. D'Onofrio testified that they are unaware of any similar kinds of things that happened, similar things at the Blue Ribbon that happened with respect to other businesses who happened to have conflicts with Hawley Enterprises.

The Government is prepared to present evidence that in at least two and possibly three incidents, people who crossed Hawley Enterprises, a business owned and operated by Mr. Curcio and Mr. Hawley, suffered a consequence of having property damaged. The Jencks material that the Government has provided to counsel at this point relates specifically to one of the incidents, that incident being Axelrod's Emporium which was located in Westport. It's an incident which occurred on December 31 of 1981 and has to do with a situation where a Hawley machine was to be returned, another machine was to be brought in and within a short period of time after this conflict arose, the non-Hawley machine was smashed.

* * * *

MR. BOWMAN: The person who smashed the machine is unidentified. Hawley Enterprise, the corporate entity, is not under indictment in this case. There are two individuals who have been indicted in this case and who are standing trial, and Mr. Durham's assertion and his theory that if there was a problem with Hawley Enterprises and there was an event afterwards involving the destruction of somebody's property, then it must be attributed to these two defendants, I think, is improper.

* * * *

[OVERNIGHT RECESS]

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[6/14/84]

THE COURT: Gentlemen, are there any preliminary matters before we have the jury?

MR. BOWMAN: Your Honor, I don't know what the Government's offer is this morning. Maybe the Government

could advise us of whether they are going to put on any evidence that we discussed yesterday afternoon before we broke for the day.

MR. DURHAM:

* * * *

With respect to the matters we discussed yesterday afternoon, the witnesses that the Government would have expected to have called were — we were not able to serve them with subpoenas. Their whereabouts have become unknown to the Government.

THE COURT: Does that answer your inquiry, sir?

MR. BOWMAN: In view of that, your Honor, I renew my previous motion for mistrial. The Government inquired of Mr. Hawley on other crimes evidence and could not tie that evidence to either Mr. Hawley or Mr. Curcio. They represented that they could. They did it at their peril. The rule is clear that they had to have a factual basis for it. They had no factual basis that they could present to this Court.

My client has been irreparably prejudiced, irreparably prejudiced, and I move for a mistrial.

* * * *

MR. DURHAM: Well, may it please the Court, counsels' argument in that regard is in error. There is in fact a factual basis. Whether or not the Government puts on extrinsic evidence concerning that is a separate issue. I would represent to the Court that there is a factual basis. The Government asked the questions in good faith based on the factual basis. I will be glad to state on the record what the factual basis was for asking the questions.

THE COURT: Why don't you do that, Mr. Durham, please.

MR. DURHAM: Yes, ma'am. With respect to the Subalpino Club, the Government would represent that when the question was asked it was in possession of information including grand jury testimony from individuals who indicated that in December of 1979 there was a cigarette machine, a Hawley machine, which was at the Subalpino Club. That machine was

not working and repeatedly efforts were made to have the machine removed by Hawley Enterprises.

Specifically, Jencks material for that individual has been provided to counsel. That individual made repeated telephone calls to Hawley Enterprise. That individual subsequently received a telephone call from Gus Curcio who identified himself on the phone —

MR. BOWMAN: Objection. He did not. I don't believe that's an accurate statement. I think that the police report doesn't reflect that he said, "I'm Gus Curcio."

MR. DURHAM: If you read the grand jury testimony, the person quite clearly called from Hawley Enterprises and said, "You know who the — "expletive —" you're dealing with? This is Gus and you'd better not —" expletive — "forget it." Within a matter of a day, could have been two days, I'm not certain.

MR. BOWMAN: It was five days.

MR. DURHAM: Well —

MR. BOWMAN: I have the report here. I think if we're talking about an offer of proof, we ought to try to be as accurate as possible.

MR. DURHAM: Counsel is talking about the police report. I'm talking about the grand jury testimony. Within a matter of a day or two, somebody from Hawley Enterprises arrived at the Subalpino Club to remove the cigarette machine. The machine had been placed outside the Subalpino Club since they had not arrived earlier and apparently had been vandalized.

And I believe it was then the following day, perhaps the next day, the individual who had talked to Mr. Curcio on the phone and had been advised who it was and he shouldn't forget it, that individual had a visit from four people who were masked, who came in and beat him with an ax handle and destroyed the interior to the club, the bar area of the club.

There had been no other problems with any other individuals or any other businesses other than Hawley Enterprises in connection with this individual in this situation. The person who was beaten and testified before the grand jury has gone into hiding and, to the knowledge of the Government, so has his

family. So we were unable to serve a subpoena on that individual, locate him, notwithstanding rather substantial efforts undertaken by the Government to locate that individual.

With respect to Axelrod's Emporium, I would indicate to the Court that Hawley Enterprises, the evidence would have shown that Hawley Enterprises took over an account at Axelrod's Emporium with some video machines. At some point in time in November of 1981, Axelrod's Emporium, specifically, Mr. Melvin Axelrod, asked Hawley Enterprises to remove their machine. There were at least a half dozen calls to Hawley Enterprises concerning the removal of that machine. There was no action.

A competitor then put a machine into Axelrod's Emporium and another call was made or additional calls were made to Hawley Enterprises for their machine to be removed. Hawley Enterprises was advised that if they didn't come get the machine, it would be put out on the street, which it was. I believe it was put on the street on December 15 of 1981 or on the sidewalk out in front of the business.

The machine was then removed on December 15. The following day which was December 16, Hawley Enterprises employees came to Axelrod's Emporium and wanted to know where the machine was and subsequently claimed that it had been stolen, and Hawley Enterprises filed a stolen property report with the Westport Police Department. On December 21, then, a woman who we cannot have come into court because of recent surgery, she simply can't come to court, was inside Axelrod's, was the only person inside Axelrod's when this occurred and an individual came in who was masked, was carrying a gun, was described as six foot one, six foot one or six foot two, weighing two hundred pounds. The woman was made to lay on the floor and she heard what she believed was a gunshot and the machine was broken.

The evidence would have shown it was not a gunshot but a blunt instrument used to smash the screen of the competitor's video machine. The evidence would have shown shortly after that, a call was made to Hawley Enterprises to ask Hawley

Enterprises to put another machine of theirs in the establishment which was agreed to by Hawley Enterprises. The individual who will testify to those facts is not in the state of Connecticut either. That's what the Government's offer of proof would be.

So that from the Government's perspective, certainly there is clear and convincing evidence, albeit in some instances circumstantial evidence, of the involvement of Hawley Enterprises in these events. There's a good faith factual basis of asking the questions and irrespective of whether or not extrinsic evidence would have come in had the government been able to subpoena these various individuals or serve subpoenas on these various individuals, the status of the questions then remain there isn't any other impeaching material. The Government is stuck with the answer, the answers to the questions which were no, and we are stuck with that.

* * * *

THE COURT: The motion for a mistrial is denied. The motion for a severance is denied.

At the time the questions were posed, the Court did make the inquiry to which Mr. Minogue alluded and the Government represented that it would be able to present the evidence which would support those questions, and I have no reason to doubt that at the time that representation was made by the Government, that the Government believed that that was the fact, that it indeed could present the evidence in question. I don't suggest and I don't think counsel has suggested that there was any bad faith on the part of the Government at the time that representation was made.

Whatever the explanation for the extraordinary coincidence that these persons, both of these persons are not available for service of subpoena and appearance in court, whatever the implications of that may be, it seems to me that in the absence of the connecting evidence, however, that the testimony, the questions and the answers which were asked of Mr. Hawley with respect to the incidents at the Axelrod's Emporium and the

Subalpino Club, and I believe the same questions were asked of Mr. D'Onofrio —. Would you refresh my recollection on that?

MR. DURHAM: That's correct, your Honor.

THE COURT: I think that the jury must be instructed to disregard both the questions and the answers that were posed to them with respect to the incidents in those two establishments, and that is what the Court is prepared to do and that is all the Court is prepared to do.

* * * *

(Whereupon the jury entered the courtroom.)

THE COURT: Good morning.

THE JURY: Good morning.

THE COURT: Please be seated.

Ladies and gentlemen, before we go on to the next witnesses who are going to be heard, I have instructions for you to the following effect: You will recall that during the Government's cross-examination of Mr. Hawley and of Mr. D'Onofrio, questions were asked with respect to alleged incidents occurring at a place known as Axelrod's Emporium and another establishment called the Subalpino Club. Those questions were permitted to be asked of the witnesses at that time in the expectation that evidence would be introduced to verify the allegations made in those questions. There will be no such evidence offered during the balance of the trial, ladies and gentlemen. Therefore, there is no evidence to connect either Mr. Hawley or Mr. Curcio to the alleged incidents that occurred in both of those places.

The result is that those questions and their answers are stricken from the record and this means, as I've indicated to you before, that they are to play no part, no part in your consideration of the guilt or innocence of these defendants with respect to the crime with which they are charged. So that you are to strike it from your memory and it would not be part of your deliberations when the case is finally submitted to you. Thank you.

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